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IN THE

Supreme Court of the United States

October Term, 1940

No. 205

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

GERALD A. EUBANK,

Respondent.

PETITION FOR REHEARING

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GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*, *v.* GERALD A. EUBANK, *Respondent.*	No. 205

PETITION FOR REHEARING

The respondent herein prays for a rehearing and a reargument in this case and for a stay of mandate until such rehearing and reargument have been had. The opinion of this Court was rendered and judgment entered on November 25, 1940.

The sole question involved is whether renewal commissions, received by respondent's assignee during 1933, under general agency contracts voluntarily assigned by respondent in 1924 and 1928, are to be included in respondent's taxable income for the year 1933.

As the grounds for this petition, the respondent respectfully urges:

1. If the Court decided the case on the assumption that the assignments were for the benefit of, or reserved any rights to, the respondent, the decision was erroneous on the record.

The opinion of the Court states:

> "No purpose of the assignments appears other than to confer on the assignees the power to collect the commissions, which they did in the taxable year. The Government and respondent have briefed and argued the case here on the assumption that the assignments were voluntary transfers to the assignees of the right to collect the commissions as and when they became payable, and the record affords no basis for any other."

We assume that the statement just quoted does not mean that the case was decided on the theory that the assignments were mere assignments for collection for the benefit of the assignor, or that anything in the assignments (R. 33-34, 36-37), or in the terms of the trust instrument (not in the record) under which the assignee was trustee, provided such benefits for the assignor as to justify taxing to him the payments received by the assignee as a result of the assignments.

The assignments were concededly voluntary, *i.e.*, they were gifts. Nothing in the record, however, justifies treatment of the assignee as anything except a separate and independent entity. The government throughout treated the trust as such and raised no question as to the application by the assignee of the commissions collected by it.* As the Board of Tax Appeals stated in its opinion (R. 13),

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*In its brief in this Court the government suggested that if the case were remanded to ascertain the beneficiaries and nature of the trust, it would offer certain proof (petitioner's main brief, footnote, pp. 5-6). If this issue had been raised at the trial, respondent would have had the opportunity to introduce countervailing evidence which existed (see respondent's main brief, footnote, p. 5).

"the pleadings raised no question about the use of the commissions in question, so that this is not a case of income attributable to an assignor or settlor by reason of application of the income for his use or benefit." As this issue was not raised by the pleadings or tried, the decision of this Court will inevitably be taken as establishing a general principle of law not related to that issue.

2. This case is not controlled by *Helvering* v. *Horst*, the so-called "companion case".

In the *Horst* case the Court stated:

> "The sole question for decision is whether the gift, during the donor's taxable year, of interest coupons detached from the bonds, delivered to the donee and later in the year paid at maturity, is the realization of income taxable to the donor."

In holding the donor of the coupons taxable, the Court characterizes in the following words various decisions thought to require that result:

> "Underlying the reasoning in these cases is the thought that income is 'realized' by the assignor because he, who owns or controls the source of the income, also controls the disposition of that which he could have received himself and diverts the payment from himself to others as the means of procuring the satisfaction of his wants. The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires, whether he collects and uses the income to procure these satisfactions or whether he disposes of the right to collect it as the means of procuring them."

In the *Horst* case the assignor may thus have been taxable for one or both of two reasons, first, because he

continued to "own or control the source of the income", or second, because he, during the taxable year in question, obtained "the satisfaction of his wants" by disposition during that year of his right to receive income.

Neither of those reasons exists in the present case.

First, this is clearly not a case in which the taxpayer continued to "own or control the source of the income." The assignment was of the entire contracts owned by the assignor, including the right to receive payments thereafter becoming due thereunder. Nothing whatsoever was retained by the assignor; the assignments divested Eubank of all interests in the contracts.* They vested in the assignee not only the right to collect and to use moneys due under the contracts, but also the right to sell, assign, transfer or cancel the contracts, including the right to receive payments thereunder, without any further action by the assignor. In brief there was a transfer of everything that the assignor had, and nothing remained for the assignor to do to perfect the assignee's right to receive payment.

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*The transfer of the Canada Life contract in 1924 was in the following language: "For a valuable consideration * * * Eubank hereby sells, assigns and transfers to Union Trust Company * * * all his right, title and interest in and to a certain agreement * * * between Canada Life Insurance Company * * * and Eubank * * * made in connection with the employment by said assurance company of said Eubank as a branch manager for said company, together with all moneys payable or to become payable to the said Eubank, under and by virtue of the terms of said contract" (R. 36-37).

While the assignment in 1928 (R. 33-34) is not in its language as clearly an assignment of the entire Aetna contract, it does, it is submitted, nevertheless transfer the respondent's entire interest therein. Without pursuing this point in this petition, it must be clear that, if the decision is wrong as to the first transfer certainly the Court will wish to reconsider the opinion on that account, and that will be time enough to go into the language of the transfer of the second contract.

It must be remembered that this case does not involve any arrangement set up specially by the taxpayer to postpone the payment to him of compensation for services and thus to create something which might be assigned to another. The general agency contracts here involved are in the traditional and usual form for such contracts.

It may fairly be asserted that in assigning the contract, Eubank was transferring to the assignee the source of the income thereafter receivable thereunder, just as in *Blair* v. *Commissioner,* 300 U. S. 5 (1937), it was felt that a beneficial interest in the source of the income had been assigned and just as would have been the fact in the *Horst* case if the bond as well as the coupons had been transferred.

The record herein contains nothing as to the nature of a general agency contract or the business conducted thereunder, except what may be gathered from the contracts themselves, which appear as exhibits to the stipulation of facts. From those contracts, however, it appears that general agency contracts are far more than contracts for the rendering of personal services by the agent. They are contracts for the carrying on of a business. They contemplate the appointment of sub-agents; they require the general agents to employ "a sufficient number of agents to canvass the territory named," and to see to it that the insurance company is "represented therein by efficient, active agents" (R. 27, 30). Commissions payable under such contracts represent in substance the receipts of a business, the excess of which over expenses constitute net income. The contracts themselves refer to the agency as a "business", as in the statement that "the business shall be conducted in all respects in accordance with the instructions of said party of the first part" (R. 27) and in the agreement against

assignment or transfer of "said agency or business" without consent (R. 28). It is common knowledge that such contracts are commonly bought and sold, and likewise are often bought in for value by the insurance company concerned. It is of record here that a successor to Eubank paid $12,000 for the right to take over the Aetna Life Insurance Company agency one month prior to the termination date otherwise in effect (R. 24).

The assignments here involved thus may be likened to a transfer of a business in liquidation. The contracts expressly provide that the renewal commissions payable under the contracts after termination of the agency "shall be accepted in full compensation for his interest in the agency hereby conveyed" (R. 32, 29). The amounts payable are the same renewal commissions which the general agent would have received if the general agency had continued, less a charge for collecting the premiums with respect to which the commissions become payable and less any commissions payable to sub-agents (R. 28-9, 32; see Ex. D following R. 34).

In any event, this is either a case in which the assignor transferred the source of the income, or a case in which there was no source or corpus which could be transferred. It is not a case of retention of control of the source.

Second, this is not a case in which the taxpayer obtained "the satisfaction of his wants" by means of the disposition during the taxable year of his right to receive income. Whatever satisfaction the taxpayer may have obtained he plainly obtained in 1924 and 1928 when the assignments were made. The statute taxes income realized in each taxable year. It does not tax in 1933 satisfactions, material or otherwise, obtained five or nine years

earlier. In the *Horst* case, the taxpayer's disposition of income during the tax year did accomplish a "satisfaction of wants" during that year.

Thus nothing in the decision or in the reasoning in the *Horst* case compelled or warranted the decision in this case. The language of the opinion in this case, taken with its brevity, indicates that the Court, regarding this case as concluded by the *Horst* case, may not have considered the scope and effect of its decision here. A consideration of the principles necessarily involved in the decision in this case should persuade the Court to reconsider and disaffirm its decision.

3. The decision in this case necessarily imports a principle of law not required by the statute or in policy, which is discriminatory, unfair and impracticable in its operation.

The respondent, as shown above, assigned his entire right, title and interest in the contracts producing the renewal commissions and retained no interest or control of any kind. If this Court, nevertheless, considers the assignment to be merely an assignment of the right to income only, then the decision must mean that in no case can one entitled to receive income in the future divest himself of such income by voluntary assignment, as far as federal income taxation is concerned, unless the source of such income is a fund, corpus or physical asset. In the case of securities, land or other like assets, the courts have recognized irrevocable assignments of income as divesting the assignor for tax purposes, if the assignment is accompanied by the creation of a legal or beneficial estate in the assignee for the period of time for which the assignment of income is made

—a purely legalistic concept. That result has always been taken for granted, as in *Blair* v. *Commissioner, supra.* The supposed principle permitting the divestment of income in the one case, for tax purposes, and forbidding it in the other, lacks any basis in the statute or in policy.

Surely it is not required by the statute. Section 22, on which alone the supposed rule could be based, purports to do nothing more than to state what is to be included in income; it makes no effort to define to whom income is to be taxed.

Moreover, the statutory scheme seems to require the opposite result. At the very least, what was assigned by the donor in this case was a chose in action, which is property. The basis of that property in the hands of the donor was zero. Its basis in the hands of the donee was the same, by virtue of the provisions of Section 113(a)(2) of the Revenue Act of 1932. On any sale by the assignee of the rights assigned, the entire amount of the gain would accordingly be income *to the assignee* by virtue of Sections 111 and 112. See *Taft* v. *Bowers,* 278 U. S. 470 (1929). It can hardly have been contemplated that a different result would follow where, instead of a sale by the assignee, the assignee simply collects.

Again let us assume that an insurance agent, in lieu of his contract right to receive renewal commissions over a ten-year period, receives a non-interest-bearing note in an amount equal to the estimated commissions to be received, of an assumed value of one-half of the total amount of commissions ultimately collected, and that he promptly makes a gift of such note. The note constitutes income to the agent in the amount of its fair value at the time of

receipt, but surely the difference between the fair value and the amount ultimately collected thereon constitutes gain to the donee. It is not evident why a greater tax burden should be borne by an agent who receives no taxable income prior to the time when he makes a gift of his entire rights.

It is certainly not true generally under the Revenue Act that the non-material satisfaction derived by a donor from making a gift constitutes realization of income for tax purposes, either at the time of gift or at any other time. A gift has not been considered the equivalent of a sale. For example, if a donor makes a gift of a capital asset which has increased in value since he acquired it, the gift does not constitute realization of income in the amount of such increase. Prior to the Revenue Act of 1921 the amount of such increase escaped taxation altogether, even when the property was sold by the donee, the donee's taxable basis being the value of the property at the date of gift. Congress remedied this situation in the Revenue Act of 1921 but the remedy adopted was not to tax the increment in value to the donor at the time of gift or at any other time, but to make the donee take the donor's basis in computing his taxable gain. In that way the increase in value during the time of the donor's ownership was taxed to the donee. See *Taft* v. *Bowers, supra.*

The supposed principle thus seems at variance with the statutory scheme.

It might not be unfair if Congress decided to treat the making of a gift as the realization of income to the same extent as on a sale and thus to tax a donor at the time of the gift on the amount of any theretofore untaxed appreciation in value. It would be utterly unfair, however, if Congress

should provide that a donor should be taxed not only on appreciation of value up to the time of the gift but on any appreciation of value occurring while the property was held by the donee. That, however, is the effect of the decision in the present case. The respondent in 1924 and in 1928, respectively, gave up all control over the contracts. It is clear that the full amount of whatever satisfaction he derived was limited to the value of these contracts in 1924 and in 1928 and was not measured by the amount the assignee ultimately collected. The decision in this case entirely ignores these limitations of time and value.

The unfairness of the discrimination against the taxpayer, whose income is receivable only by virtue of his business or services, in withholding from him a tax privilege, the substance of which is available to one whose income consists of returns from capital assets, has been adverted to above. In other respects, the supposed principle is unfair, discriminatory and unworkable.

What is to happen, for instance, if the assignee sells for a valuable consideration the entire assigned contract during, say, the year following the original assignment? Does the full amount realized by the assignee automatically become income to the assignor in the year of such sale, or is it to be the rule that the assignor is to continue to take up into his income the commissions which it is estimated he would have received if the sale had not been made, or are the commissions actually received by the second assignee to be taken up in the income of the first assignor—a solution not available if the contract has been sold to the insurance company and cancelled.

There is no apparent reason why the principle would not be applied to the gift or a going business, to the extent

that accounts receivable thereof when received would be income. On the other hand, presumably it would not apply in the case of a gift of a stock certificate, the basis of which in the hands of the donor was zero, in spite of the fact that every amount received by the donee, whether as dividends, on a sale of the stock, or on liquidation of the corporation, would be income.

This argument is not made on the assumption that the tax laws must necessarily represent in all respects an integrated whole or must be in all respects devoid of discriminatory features. Yet it should be the aim of the courts so to construe them as to give effect to the entire statutory scheme, including in this instance the provisions with respect to the taxation of donees, and to eliminate, rather than to create, discriminations not required by the language of the statute. For the solution of the present problem the use of the words "compensation for personal services" in Section 22 adds nothing to the word "income" therein, and the use there of the word "income" certainly does not compel, if it can be stretched to permit, a doctrine that income, the right to which once accrues to a taxpayer, must always be taxed to him, although he never received it. The doctrine plainly does not apply if the right to the income accrues by virtue of the holding of securities, land or other like assets, where an "interest" in such assets for the period of time in question can be created. Whether such a doctrine should exist ought to be seriously considered, or reconsidered, by this Court.

CONCLUSION

It is prayed that this cause be set down for reargument at the earliest convenient session of this Court.

Respectfully submitted,

E. W. DEBEVOISE,
HARRY J. RUDICK,
Counsel for Respondent.

January 20, 1941.

CERTIFICATE UNDER RULE 33

E. W. DEBEVOISE, one of the attorneys for respondent, certifies that he is a member of the Bar of this Court; that he has prepared the foregoing Petition and is familiar with all the facts stated therein; and that the foregoing Petition is submitted in good faith and not for purposes of delay.

New York, N. Y., January 20, 1941.

E. W. DEBEVOISE

P. 1, separate opinion.

SUPREME COURT OF THE UNITED STATES.

No. 205.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Gerald A. Eubank.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 25, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

This is a companion case to No. 27, *Helvering* v. *Horst*, decided this day, and presents issues not distinguishable from those in that case.

Respondent, a general life insurance agent, after the termination of his agency contracts and services as agent, made assignments in 1924 and 1928 respectively of renewal commissions to become payable to him for services which had been rendered in writing policies of insurance under two of his agency contracts. The Commissioner assessed the renewal commissions paid by the companies to the assignees in 1933 as income taxable to the assignor in that year under the provisions of the 1932 Revenue Act, 47 Stat. 169, § 22 of which does not differ in any respect now material from § 22 of the 1934 Revenue Act involved in the *Horst* case. The Court of Appeals for the Second Circuit reversed the order of the Board of Tax Appeals sustaining the assessment. 110 F. (2d) 737; 39 B. T. A. 583. We granted certiorari October 14, 1940.

No purpose of the assignments appears other than to confer on the assignees the power to collect the commissions, which they did in the taxable year. The Government and respondent have briefed and argued the case here on the assumption that the assignments were voluntary transfers to the assignees of the right to collect the commissions as and when they became payable, and the record affords no basis for any other.

For the reasons stated at length in the opinion in the *Horst* case, we hold that the commissions were taxable as income of the assignor in the year when paid. The judgment below is

Reversed.

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SUPREME COURT OF THE UNITED STATES.

No. 205.—October Term, 1940.

Guy T. Helvering, Petitioner, *vs.* Gerald A. Eubank.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 25, 1940.]

The separate opinion of Mr. Justice McReynolds.

The cause was decided upon stipulated facts. The following statement taken from the court's opinion discloses the issues.

"The question presented is whether renewal commissions payable to a general agent of a life insurance company after the termination of his agency and by him assigned prior to the taxable year, must be included in his income despite the assignment.

"During part of the year 1924 the petitioner was employed by The Canada Life Assurance Company as its branch manager for the state of Michigan. His compensation consisted of a salary plus certain commissions. His employment terminated on September 1, 1924. Under the terms of his contract he was entitled to renewal commissions on premiums thereafter collected by the company on policies written prior to the termination of his agency, without the obligation to perform any further services. In November 1924 he assigned his right, title, and interest in the contract as well as the renewal commissions to a corporate trustee. From September 1, 1924 to June 30, 1927, the petitioner and another, constituting the firm of Hart & Eubank, were general agents in New York City for the Aetna Life Assurance Company, and from July 1, 1927 to August 31, 1927, the petitioner individually was general agent for said Aetna Company. The Aetna contracts likewise contained terms entitling the agent to commissions on renewal premiums paid after termination of the agency, without the performance of any further services. On March 28, 1928, the petitioner assigned to the corporate trustee all commissions to become due him under the Aetna contracts. During the year 1933 the trustee collected by virtue of the assignments renewal commissions payable under the three agency contracts above mentioned, amounting to some $15,600. These commissions were taxed to the petitioner by the commissioner and the Board has sustained the deficiency resulting therefrom."

The court below declared—

"In the case at bar the petitioner owned a right to receive money for past services; no further services were required. Such a right is assignable. At the time of assignment there was nothing contingent in the petitioner's right, although the amount collectible in future years was still uncertain and contingent. But this may be equally true where the assignment transfers a right to income from investments, as in *Blair* v. *Commissioner*, 300 U. S. 5, and *Horst* v. *Commissioner*, 107 F. (2d) 906 (C. C. A. 2), or a right to patent royalties, as in *Nelson* v. *Ferguson*, 56 F. (2d) 121 (C. C. A. 3), cert. denied 286 U. S. 565. By an assignment of future earnings a taxpayer may not escape taxation upon his compensation in the year when he earns it. But when a taxpayer who makes his income tax return on a cash basis assigns a right to money payable in the future for work already performed, we believe that he transfers a property right, and the money when received by the assignee, is not income taxable to the assignor."

Accordingly, the Board of Tax Appeals was reversed; and this, I think, is in accord with the statute and our opinions.

The assignment in question denuded the assignor of all right to commissions thereafter to accrue under the contract with the insurance company. He could do nothing further in respect of them; they were entirely beyond his control. In no proper sense were they something either earned or received by him during the taxable year. The right to collect became the absolute property of the assignee without relation to future action by the assignor.

A mere right to collect future payments, for services already performed is not presently taxable as "income derived" from such services. It is property which may be assigned. Whatever the assignor receives as consideration may be his income; but the statute does not undertake to impose liability upon him because of payments to another under a contract which he had transferred in good faith, under circumstances like those here disclosed.

As in *Helvering* v. *Horst* just decided, the petitioner relies upon opinions here; but obviously they arose upon facts essentially different from those now presented. They do not support his contention. The general principles approved in *Blair* v. *Commissioner*, 300 U. S. 5, and applied in *Helvering* v. *Horst*, are controlling and call for affirmation of the judgment under review.

The Chief Justice and Mr. Justice Roberts concur in this opinion.